

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 10-2033 (FLW)

IN RE JOHNSON & JOHNSON : TRANSCRIPT OF PROCEEDINGS
DERIVATIVE LITIGATION :
----- : OCTOBER 18, 2012

CLARKSON S. FISHER UNITED STATES COURTHOUSE
402 EAST STATE STREET, TRENTON, NJ 08608

B E F O R E : THE HONORABLE FRED A. L. WOLFSON, USDJ

A P P E A R A N C E S :

CARELLA, BYRNE, CECCHI, OLSTEIN & AGNELLO, ESQUIRES
BY: JAMES E. CECCHI, ESQUIRE

-and-

BERNSTEIN, LITOWITZ, BERGER & GROSSMANN, ESQUIRES
BY: MARK LEBOVITCH, ESQUIRE

-and-

MORRIS & MORRIS, ESQUIRES
BY: KAREN L. MORRIS, ESQUIRE
PATRICK F. MORRIS, ESQUIRE

-and-

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BY: TRAVIS E. DOWNS, III, ESQUIRE
On behalf of the Demand Futility Plaintiffs

KANTROWITZ, GOLDHAMER & GRAIFMAN, ESQUIRES
BY: GARY S. GRAIFMAN, ESQUIRE

-and-

ABRAHAM, FRUCHTER & TWERSKY, ESQUIRES
BY: JEFFREY S. ABRAHAM, ESQUIRE
PHILIP T. TAYLOR, ESQUIRE
On behalf of the Demand Refused Plaintiffs

(Continued)

* * * * *

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-and-

SIDLEY, AUSTIN, ESQUIRES

BY: WALTER C. CARLSON, ESQUIRE

KRISTEN R. SEEGER, ESQUIRE

On behalf of the Defendant Johnson & Johnson

WILLIAM E. CRACO, ESQUIRE

In-House Counsel for Johnson & Johnson

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI, ESQUIRES

BY: EDWIN F. CHOCIEY, ESQUIRE

-and-

PATTERSON, BELKNAP, WEBB & TYLER, ESQUIRES

BY: ERIK HAAS, ESQUIRE

JOSHUA A. GOLDBERG, ESQUIRE

On behalf of the Individual Defendants

CENTER FOR CLASS ACTION FAIRNESS

BY: THEODORE H. FRANK, ESQUIRE

-and-

SAMUEL & STEIN, ESQUIRES

BY: DAVID M. NIEPORENT, ESQUIRE

On behalf of Intervenor/Objector Mark G. Petri

C E R T I F I C A T I O N

PURSUANT TO SECTION 753, TITLE 28 U.S.C., THE
FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE
TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE
ABOVE-ENTITLED MATTER.

S/Vincent Russoniello
VINCENT RUSSONIELLO, C.C.R.
OFFICIAL U.S. COURT REPORTER

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1 (In open court.)

2 THE CLERK: All rise.

3 THE COURT: Thank you.

4 I'll have the appearances, and everyone else
5 may be seated.

6 MR. CECCHI: Good morning, your Honor.

7 James Cecchi, Carella, Byrne, on behalf of the
8 plaintiffs. With me here today is Karen Morris from
9 Morris & Morris.

10 MS. MORRIS: Good morning, your Honor.

11 THE COURT: Good morning.

12 MR. CECCHI: Mark Lebovitch, Bernstein,
13 Litowitz.

14 MR. LEBOVITCH: Good morning, your Honor.

15 MR. CECCHI: Gary Graifman from his firm.

16 MR. GRAIFMAN: Kantrowitz, Goldhamer &
17 Graifman, liaison counsel for the demand refused
18 plaintiffs.

19 MR. CECCHI: And Jeff Abraham.

20 MR. ABRAHAM: Good morning, your Honor.

21 THE COURT: Good morning.

22 MR. CECCHI: And Travis Downs from Robbins
23 Geller.

24 MR. DOWNS: Good morning, your Honor.

25 THE COURT: Good morning.

1 MR. CECCHI: Frank Morris from Mr. Morris'
2 firm as well.

3 MR. MORRIS: Good morning, your Honor.

4 MR. CECCHI: And Phil Taylor from
5 Mr. Abraham's firm.

6 MR. TAYLOR: Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. CARLSON: Good morning, your Honor.

9 Walter Carlson on behalf of Johnson & Johnson.
10 With me today is my partner Kristen Seeger.

11 MS. SEEGER: Good morning, your Honor.

12 MR. CARLSON: Don Robinson from Robinson,
13 Wettre & Miller.

14 Bill Craco, Assistant General Counsel at
15 Johnson & Johnson.

16 MR. CRACO: Good morning, your Honor.

17 THE COURT: Good morning.

18 MR. HAAS: Good morning, your Honor.

19 Erik Haas, Patterson, Belknap, Webb & Tyler,
20 on behalf of the individual defendants.

21 MR. GOLDBERG: Good morning, your Honor.

22 Joshua Goldberg also from Patterson, Belknap,
23 on behalf of the individual defendants.

24 MR. CHOCIEY: Good morning, your Honor.

25 Edwin Chociey, Riker, Danzig, Scherer, Hyland

1 & Perretti, New Jersey counsel for the individual
2 defendants.

3 THE COURT: Good morning.

4 MR. CARLSON: Thank you.

5 MR. FRANK: Theodore H. Frank, for the
6 intervenor and objector Mark Petri.

7 MR. NIEPORENT: David Nieporent, Samuel &
8 Stein, also for the intervenor and objector.

9 THE COURT: Thank you.

10 Everyone may have a seat.

11 I have received, obviously, substantial
12 submissions now from counsel for the plaintiffs
13 seeking approval of the settlement as well as the
14 objectors' submissions and then replies. With all the
15 paper that I have received, frankly, I'm not looking
16 for presentations today. I have a number of questions
17 that I would like to ask counsel. But before I do
18 that, let me just ask any of the attorneys that are
19 here if there is anything though you would like to
20 place on the record that was not in your papers that
21 you in some way want to bring to my attention before I
22 begin any questions that you think was left out or
23 because of some filing that you want to respond to at
24 this time.

25 MR. FRANK: I have several.

1 THE COURT: You are going to have to come
2 forward where there is a microphone. So we're going
3 to have to make room for you even if you think they
4 are the enemy.

5 MR. FRANK: Theodore H. Frank for the
6 objector.

7 Obviously, the plaintiffs submitted two sets
8 of briefs after our last brief that we haven't had an
9 opportunity to respond to. We were told that you
10 didn't want another brief from us, so we didn't submit
11 a brief. They made a number of legal arguments I
12 certainly would like to address if you were to
13 consider them, but we can wait for your questions and
14 see to what extent they are relevant.

15 THE COURT: Go ahead. If you are going to
16 highlight what they are now, that will be fine. Maybe
17 it will remove some of my questions.

18 MR. FRANK: Well, we have a new declaration
19 from Harvey Pitt saying that what he is doing is okay
20 because you can't tell the value of a shareholder
21 benefit from the share price; and that directly
22 contradicts what Bernstein, Litowitz does in every
23 securities litigation where they say what has happened
24 to the corporation has harmed the corporation, is
25 reflected in the share price. And, in fact, that's

1 the holding of the Supreme Court in Basic, Inc. v.
2 Levinson, 485 U.S. 224, where at 244 they say:

3 "In an open and developed market the
4 dissemination of material misrepresentations or
5 withholding the material information typically affects
6 the price of the stock, and purchasers generally rely
7 on the price of a stock as a reflection of its value."

8 THE COURT: I'm assuming you are talking about
9 some sort of 10(b)(5) action, or something like that,
10 when you are talking about "misrepresentations." This
11 is a little bit different.

12 MR. FRANK: Not in terms of the economic
13 significance of the price of the stock. And what
14 Mr. Pitt is saying is that he knows the value of the
15 stock better than what the market does. He actually
16 says you can't tell what is going to happen in the
17 future from the price of the stock. But that's
18 exactly what you could tell from the market price.

19 The market price reflects -- and this is just
20 Finance 101, the first thing they teach you -- the
21 market price of the stock reflects the expected value
22 of the future income stream, and the income stream is
23 going to change because the company is actually less
24 likely to suffer adverse consequences from future
25 actions in terms of the FCPA in terms of other quality

1 control issues that would be reflected in the stock
2 price. And, in fact, with other corporate governance
3 changes, you do see it move in the stock price where
4 the corporate governance change does make a material
5 difference in the value of the company.

6 When you have a corporate governance change,
7 that makes the company resistant to hostile takeovers.
8 You see a decline in the stock price.

9 THE COURT: Well, isn't it really also what
10 Mr. Pitt -- what do you call him, Commissioner Pitt,
11 Chairman Pitt? To some extent, isn't what he is
12 saying is, there isn't just one way to determine this,
13 and this event study, which is what your professors
14 have opined about, your experts, is one way that has
15 been out there in the academic literature certainly?

16 MR. FRANK: Ah-huh.

17 THE COURT: But I don't think that Pitt is
18 necessarily saying maybe it works, maybe it doesn't
19 work; but he is saying it's certainly not the only
20 thing to do, and it hasn't really been accepted by
21 others in real life terms. I have a hard time seeing
22 where you have presented to me that this kind of event
23 study has been used in cases otherwise.

24 MR. FRANK: Well, actually, the plaintiffs
25 concede that it's been used in cases otherwise. They

1 concede that it's used in securities litigation.

2 THE COURT: That it can be, because I don't
3 think anyone -- has anyone pointed out a case to me
4 where this has been an accepted way of doing it? They
5 say that you have. Have you?

6 Who is speaking for that?

7 MS. MORRIS: Not in derivative litigation.

8 THE COURT: Right. All I'm talking about is
9 derivative. That's why I started you with this,
10 Mr. Frank, which is that even the quote that you gave
11 me about misrepresentations, et cetera -- which come
12 up in a different kind of case, and I really am
13 talking about shareholder derivative cases where you
14 are talking about corporate governance that comes in
15 the injunctive type of relief.

16 Can you point to a case where the event study
17 has been recognized and used by a Court?

18 MR. FRANK: Well, again, the market is the
19 market, and the fact that it's been used in a
20 shareholder --

21 THE COURT: Can you just answer my question?

22 MR. FRANK: It has not been accepted or
23 rejected.

24 THE COURT: That's all I asked: Has it been
25 used? I didn't ask if it's been accepted or rejected.

1 It hasn't come up at all.

2 In many ways, as I have read it, these are
3 some of the academic debates. In fact, in my own
4 research, we've looked at some other articles that
5 have been written by professors that talk about
6 different ways that we could do this. Professor
7 Erickson in an article written has talked about it in
8 2010 about some other methods. So they are all great
9 methods, perhaps academically, and I've just asked,
10 and I hear you that you are suggesting it's something
11 that we should employ here.

12 The problem is, and I think the manner in
13 which you have briefed the issue is, it's not just
14 saying this could be a method, and it wasn't done
15 here, and, Judge, take a look at how they valued it.
16 You've suggested it is the way to do it; and having
17 not done it, we've drawn into question the entire
18 settlement and the value of the settlement.

19 MR. FRANK: My point is that the plaintiffs
20 have the burden of proving the value of the
21 settlement.

22 THE COURT: They do.

23 MR. FRANK: And they can't come up and just
24 say: Here is an expert, the expert has really good
25 credentials, and he's now just going to say this is a

1 great way to do it, when in fact the expert has given
2 no indication that he's considered the before and the
3 after, the marginal difference.

4 The plaintiffs say: Look, we now have a
5 corporate resolution, and that's better than the
6 credo. Before there was a credo; now there is a
7 corporate resolution.

8 THE COURT: Well, there is more than corporate
9 resolution and --

10 MR. FRANK: I understand that.

11 THE COURT: Just one moment, Mr. Frank.

12 When you say they can't get up and say "We've
13 got an expert that says this," first of all, we start
14 with -- and I know that your experts have themselves
15 agreed that the experts that the plaintiffs have
16 retained are eminently qualified. We start with that
17 on qualifications. They both said that in their
18 reports. I read that.

19 MR. FRANK: Ah-huh.

20 THE COURT: So the qualifications are not at
21 issue. So if you have a well-qualified individual in
22 the area, what do you have to argue, that such an
23 expert cannot provide an opinion based upon their
24 experience in the field and explaining why their
25 experience leads them to a particular conclusion?

1 That's precisely one of the things experts can opine
2 on. It does not make it unreliable.

3 MR. FRANK: We have two arguments on that,
4 your Honor. The first one is the experience is not
5 enough when there are better ways to do it, when there
6 is a scientifically reliable methodology. If Harvey
7 Pitt tried to submit a peer-reviewed publication, I
8 think we should have a methodology, and the benefits
9 outweigh the costs for engendering compliance; no
10 academic journal would take that. It wouldn't be
11 considered economically reliable; it wouldn't be
12 considered scientifically reliable. And when it's not
13 reliable enough for academia, it's not reliable enough
14 in the justice system.

15 Even the cases they cite -- Kumho Tire v.
16 Carmichael, 526, 137, that case involved the exclusion
17 of an expert who used a methodology that other experts
18 in the industry did not use and was unsupported by any
19 articles or papers that validated the expert's
20 approach. And here we do have articles and papers
21 that say you don't do it this way; you do it another
22 way.

23 THE COURT: What was the issue in Kumho? What
24 were they opining on?

25 MR. FRANK: Engineering issues.

1 THE COURT: Exactly. It was a scientific
2 matter. We are talking about something very
3 different; and, certainly, in the field when I have
4 pharmaceutical issues, when I have scientific issues,
5 we often have experts because it's an esoteric area
6 and there actually can be testing, objective testing.

7 What we are talking about here is, we are
8 talking about, what is the effect of instituting
9 certain reform in corporate governance and will it
10 have a real impact in avoiding future harm?

11 Now, first of all, the ideas of corporate
12 governance and those improvements have certainly been
13 accepted in many cases.

14 You would agree with that; wouldn't you,
15 Mr. Frank?

16 MR. FRANK: I would agree that no one has made
17 the challenge we have made here; and, because of that,
18 because of the fact that other adversaries have failed
19 to make the best arguments, other courts have accepted
20 the mere ipse dixit of corporate governance experts.
21 But when you say that this cannot be testified by
22 objective evidence, that's absolutely 100 percent
23 wrong. As Professor Henderson says in his report, you
24 do test.

25 THE COURT: They've been wrong before. Maybe

1 not a hundred percent. But, okay. Go ahead.

2 MR. FRANK: Economists, econometricians have
3 tested the effect of corporate governance reform
4 objectively. And there is objective evidence that
5 some corporate governance reforms work. There is
6 objective evidence that other corporate governance
7 reforms have an adverse effect on shareholders, and
8 it's possible to make those objective tests.

9 Professor Henderson lists the event study; Professor
10 Litvak lists the event study and four other
11 methodologies that could be used to test.

12 It is possible to objectively test this. It
13 is possible to objectively test it in this case by
14 using the event study. How did the market react to
15 the expectation? What is the future expected value?
16 It's not enough to just say, this will help compliance
17 because there are lots of ways to help compliance that
18 hurts shareholders.

19 For example, the best way to guarantee 100
20 percent FCPA compliance, to absolutely assure that
21 there will never be a bribe to a foreign official in a
22 foreign company, is to shut down Johnson & Johnson's
23 entire international operations and restrict them to
24 the United States. That would be a hundred percent
25 compliance with the FCPA, but shareholders would be

1 hurt by that because the risk of an FCPA violation --

2 THE COURT: But the problem I have in your
3 analysis and this notion of hinging your objection on
4 the fact that there are certain academics who have
5 pointed to this market trend or trend event studies as
6 a way of determining when the share price drops, goes
7 up, whatever, what that reaction is, as to what the
8 value is, that is an academic approach, as you have
9 pointed out, neither accepted nor rejected by any
10 Court.

11 I know you believe you are making a novel
12 argument. It is certainly not something that is
13 universally accepted; and, indeed, as I pointed out, I
14 found very useful an article by another professor,
15 Professor Erickson, who in fact points out, instead --
16 again, an academic, and sometimes I worry about the
17 value of these academics as opposed to real life, like
18 a Pitt, or someone who has been out there doing the
19 work and sees what goes on -- but she has written, for
20 example, that the value of corporate governance
21 reforms can be assessed:

22 "One way to measure the benefits of corporate
23 governance settlements is to examine the link between
24 the alleged misconduct and the specific reforms
25 included in the settlement agreement."

1 And she goes on to say:

2 "If the alleged misconduct in a derivative
3 suit resulted from poor internal controls, for
4 example, and the settlement strengthens these internal
5 controls, then, at least on its face, the settlement
6 has the potential to benefit the plaintiff
7 corporation."

8 That kind of qualitative methodology, frankly,
9 if we are going to talk about what makes sense in
10 valuing a settlement, certainly, in a shareholder
11 derivative context, and when you are talking about
12 reforms or corporate governance, linking those reforms
13 to the problems that arose and addressing them, and do
14 they adequately address them, in my mind is the much
15 better test.

16 Ultimately, what we come down to here,
17 Mr. Frank, is they have essentially -- the plaintiffs,
18 through their experts -- provided that kind of
19 qualitative analysis, and certainly Chairman Pitt has
20 opined, Dr. Glass has opined from a pharmaceutical
21 perspective as well and quality control, how the
22 various reforms would address the harms and avoid them
23 in the future. I think that qualitative analysis,
24 they have satisfied their burden in that regard by
25 providing an analysis that works by people who can

1 opine on them. I reject the notion, while I'm not
2 saying that it would never be accepted to use this
3 kind of trend event analysis, it is not the only
4 method, and the Court need not find because they did
5 not do that here that somehow they have failed to meet
6 their burden.

7 So I reject that; I reject the argument that
8 having not employed that kind of analysis, they have
9 already not satisfied their burden.

10 MR. FRANK: So let's turn, then, to the
11 qualitative analysis because even that is deficient.
12 The difference here, it has to be a substantial
13 benefit. It has to make a material difference to what
14 the corporation is doing; and to do that, you have to
15 look not just at the --

16 THE COURT: By the way, Mr. Frank, are you
17 providing arguments you have not already provided?
18 This is the time to be doing that as opposed to --

19 MR. FRANK: That's correct. I have not done
20 that before.

21 For example, we have this assertion that a
22 binding resolution is materially different than the
23 long-standing decade's old company credo, that because
24 before there was a company credo and now there is a
25 binding resolution, there will be a material

1 difference in the way the company operates. But
2 that's not supported by what the experts said. The
3 words "company credo" appear nowhere in the Pitt
4 report.

5 THE COURT: That "company credo" -- I have to
6 stop you there because that to me was a nonstarter.
7 That company credo is more in the nature of an
8 aspirational statement: We are going to do these
9 great things -- one paragraph of essentially talking
10 about what our goals are, what our values are in such
11 a company, and to be right up front. Terrific,
12 Mr. Carlson, that's nice that you have those
13 aspirational statements. There is no meat on the
14 bones with that credo. It doesn't say how you will go
15 about doing it. It doesn't say how we are going to
16 make sure that you don't do it, and what you need to
17 do is give definition.

18 A "credo" by itself meant nothing. I know
19 Johnson & Johnson used that credo in many cases, by
20 the way. But to me that means nothing without what is
21 behind it; and, clearly, with that simple credo in
22 place, as I pointed out in an opinion that I issued
23 about it a year ago now, there were a number of
24 troubling things that have occurred in J&J.

25 So what does the company need to do? And, of

1 course, this is a suit against the board. What do we
2 need to do to make sure that the board is aware -- and
3 that was some of the problem with the decentralization
4 that occurred in 2006 and 2007 following whatever
5 advice they got from that wonderful McKenzie Agency of
6 how to decentralize. But it's how the information
7 moves up. And, as the plaintiffs know, one of the
8 reasons I dismissed the complaint but gave a right to
9 refile is that I didn't have enough allegations as to
10 what the board members knew.

11 So now we need to put in place a structure
12 where the people who have control of the company can
13 take action, are put in the know. I didn't ultimately
14 make a finding because it hasn't been adjudicated
15 whether any of them did know or not. I didn't have
16 enough pled to put me there. But that's what the
17 reforms are aiming to do: One, to make sure at the
18 lower levels that every employee -- bonuses, salary,
19 whatever -- is going to be pegged to maintaining
20 certain quality as down to the lowest levels, and then
21 how it moves up the chain for answering at the highest
22 levels.

23 So I stop you with "credo" because, no, that
24 was not the same as what's been done.

25 Now, move on.

1 MR. FRANK: We have an argument that there is
2 a new compensation structure and the new compensation
3 structure will make a material difference.

4 Again, there is no comparison to the old
5 compensation structure. There is no evidence that
6 Dr. Glass even considered the old compensation
7 structure. In fact, there is no evidence that the
8 settlement term is not illusory because it only
9 requires, quote, the furtherance of the quality and
10 compliance core objectives be considered.

11 Now, including furtherance as, say, a 0.1
12 percent factor would comply, but would that make a
13 material difference? Would it be better or worse than
14 what has gone on before? I don't know. The expert
15 says nothing that indicates that he knows. He just
16 again asserts conclusorily: We now have this. This
17 is good. But what was it before? Why wasn't it
18 working before? We don't know because there is no
19 comparison with the before and after; there is no
20 comparison it's a marginal difference.

21 I want to address a new argument that they
22 made in their reply. They argued that the Court
23 should ignore my objections because I'm the only
24 objector or because Mark Petri is the only objector.

25 THE COURT: No. I have a number of individual

1 objections.

2 MR. FRANK: Substantive objections, the only
3 substantive objection.

4 THE COURT: I don't think that's really their
5 argument. Let's put it there. That's not how I
6 understood their argument.

7 What they are really saying is when you are
8 looking at whether a settlement is fair and
9 reasonable, you look at the number of objections
10 received; and, in that sense, there are limited
11 numbers. I don't think they say: Reject your
12 arguments and the quality of the arguments because you
13 are only one.

14 That's not what you meant. Correct?

15 MR. CECCHI: Correct, your Honor. Definitely
16 not.

17 THE COURT: Right. It was just simply in the
18 overall thing, the numbers we have, given the number
19 of shareholders and how many objections we received.
20 That's all. Not the quality of your objections.

21 MR. FRANK: Okay.

22 Well, even the narrower argument I think is
23 incorrect, and the Third Circuit has said as much in
24 GMC Pickup, the federal truck liability -- that's 55
25 F.3d at 812 -- where the Court said:

1 "The combination of observations about the
2 practical realities of Class Actions has led a number
3 of Courts to be considerably more cautious about
4 inferring support from a small number of objectors to
5 a sophisticated settlement."

6 THE COURT: It is one of the factors. It is
7 one of the Girsh factors, that looking at the number
8 of objections -- and I think they point out as well
9 that none of the institutional investors houses have
10 objected who certainly are more sophisticated than an
11 individual investor; and we do have a lot of
12 institutional investors in this that hold the shares.

13 Put that aside. That's not really the issue.
14 I am prepared to deal with the merits of the
15 objections, and I think that's what I'm hoping that I
16 was reading that they were dealing with.

17 MR. FRANK: I would like to argue that you
18 should not infer anything from the failure of
19 institutional objectors to object. Even if an
20 institutional objector holds \$1 billion of Johnson &
21 Johnson stock, it would be economically irrational to
22 spend \$50,000 on an attorney and their experts to come
23 in and object to the settlement.

24 THE COURT: I don't know that you have any
25 basis to argue that, by the way.

1 MR. FRANK: I absolutely do, your Honor,
2 because there is \$10 million at stake here, and
3 that's -- to somebody that holds a billion dollars of
4 stock, that's \$50,000 to them. It's a big company.

5 So what's happening here is the salami is
6 being sliced. The attorneys are asking for
7 \$10 million from the shareholders. It's economically
8 rational for Gerald Walton to spend \$1.32 on postage
9 to object. He's got less than \$1.32 at stake. That's
10 how much they are costing him from what they are
11 taking from the company because it's a multi-billion-
12 dollar company, and that's why they are willing to pay
13 the \$10 million to get this to go away, because it
14 would cost them more than \$10 million to defend it.

15 I just want to say, it's economically rational
16 for the institutional investors to free-ride off of
17 what we have done here because it doesn't pay for them
18 to spend money on their own lawyers.

19 THE COURT: Well, we haven't even heard an
20 echo of a letter being sent: We join in the
21 objections of Mr. Petri in this matter. They don't
22 have to spend any money to do that.

23 MR. FRANK: Your Honor, I would be happy to
24 poll the shareholders.

25 THE COURT: Enough, Mr. Frank, on that.

1 MR. FRANK: All right.

2 THE COURT: Everyone has gotten notice now,
3 and I'll make that finding.

4 MR. FRANK: Well, but nobody got notice of our
5 objection.

6 Again, I return to the Erikson study. I don't
7 know if it's the same Erikson you are referring to,
8 but there was an Erikson study about the
9 appropriateness of attorney's fees and shareholder
10 derivatives that we cited in our brief. They didn't
11 mention it in their response or why you should
12 disregard that, given that Erikson notes that the
13 median fee in a case like this, we are talking 120th
14 of what the plaintiffs are asking for here.

15 I'll answer any other questions you have.

16 THE COURT: Why don't you have a seat for a
17 moment because I'll allow the plaintiffs to respond
18 specifically to anything that you may have now
19 included.

20 Actually, the article that I was citing was
21 Jessica Erikson Corporate Governance in the Courtroom
22 and Empirical Analysis, 51 William and Mary Law
23 Review, 1749, 2010. That's my cite.

24 MS. MORRIS: Your Honor, good morning.

25 Karen Morris on behalf of the plaintiffs.

1 Given the comments and the dialogue between
2 you and Mr. Frank, I only have one point of
3 clarification for your Honor. As you noted, our
4 briefs are quite thorough and lengthy. We provided
5 them to you. That's with respect to the compensation
6 piece. It was a very hard-fought term in the
7 negotiation process, and it is part of the entire
8 system that was built through this settlement, and
9 it's exactly as your Honor understands it.

10 We wanted to get information up to the board.
11 We wanted to have clear responsibility for the people
12 who were going to report to the board about the
13 quintessential issues that were going to percolate up
14 from underneath; and specifically I mention the
15 product versus management piece because that's where
16 it begins. It begins with product versus management.
17 That's down at the operational level of the company
18 inside of the subsidiaries of which this company has
19 250 or more.

20 So what the compensation piece is going to do,
21 just as your Honor said, it's going to align managers
22 in their assessment and taking into account the core
23 objective that was defined here, which is an
24 operational core objective, as your Honor appreciates.
25 It's a very critical point. It was hard-fought.

1 In addition, your Honor, the settlement also
2 provides that the RCGC, which is getting the reporting
3 up from the chief quality officer, will be having
4 meetings. The RCGC will consult with the compensation
5 committee to oversee the implementation of this
6 compensation provision. So it's not going to go
7 unnoted or unnoticed by the RCGC at the board level.
8 It's an important piece in bringing together the full
9 compliance and governance structure that we've
10 negotiated here.

11 So I wanted to comment on the compensation
12 issue, your Honor.

13 THE COURT: Thank you.

14 If there are no other additional comments,
15 I'll begin by asking some of my questions.

16 MS. MORRIS: Please.

17 THE COURT: Okay.

18 Why don't we first deal with, perhaps, so I
19 can resolve this issue, Mr. Petri's motion to
20 intervene and dismiss.

21 I guess, Mr. Frank, I want to talk to you
22 first.

23 MR. FRANK: Yes, your Honor.

24 THE COURT: Now, in your motion to intervene,
25 first of all, I think you do concede that in the Third

1 Circuit your status as an objector affords you the
2 right to appeal, and that you do not need to intervene
3 in order to preserve that right.

4 Correct?

5 MR. FRANK: That's correct, your Honor.

6 THE COURT: And, basically, your bases for
7 seeking dismissal of the complaint and to intervene
8 for that purpose really mirror your objections.

9 Is that correct?

10 MR. FRANK: That's correct, your Honor.

11 THE COURT: So what we are really talking
12 about is intervention so that you could make the same
13 objections and be heard by the Court, and that's so
14 that you can officially make a motion to dismiss.

15 Correct?

16 MR. FRANK: That's correct, your Honor.

17 THE COURT: I don't need to let you intervene
18 to do that; do I?

19 MR. FRANK: No, your Honor. Again, this is
20 purely belt and suspenders.

21 THE COURT: Okay.

22 MR. FRANK: There is no Circuit split on
23 whether we need to intervene. I've had a case where
24 the Third Circuit retroactively changed the rules on
25 me and told me I should have anticipated that they

1 changed the rules.

2 THE COURT: Well, whatever it is, I appreciate
3 the argument. But I don't think -- and I'll make
4 findings in an opinion that I'll render -- that
5 intervention here is appropriate, but, certainly, that
6 I'm going to hear all your objections today.

7 MR. FRANK: Thank you, your Honor.

8 THE COURT: So have a seat for a moment.
9 We'll get to objections in a bit.

10 Who is going to be arguing on behalf of the
11 plaintiffs?

12 MS. MORRIS: I will, your Honor.

13 The COURT: Now, there is a bit of an overlap
14 between obviously considering the fairness of the
15 settlement and the substantial benefit; and the
16 substantial benefit analysis mostly comes into the
17 attorney fee aspect, but they really do overlap.

18 MS. MORRIS: Yes, your Honor, they do.

19 THE COURT: Now, I would like to just ask you
20 a question for my benefit, that you've argued that it
21 is the demand letters, the filing of the derivative
22 actions, as opposed to the numerous governmental
23 investigations that were ongoing and regulatory
24 matters that were ongoing, that led J&J to adopt the
25 corporate governance reforms that are included in the

1 proposed settlement.

2 I would like to ask, apart from reviewing the
3 public records that were available at the time
4 relating to those various investigations, including
5 J&J's 10-Ks, basically the publicly available
6 information, did counsel engage in its own independent
7 research prior to preparing the initial complaint?

8 MS. MORRIS: Your Honor, we did engage in our
9 own research, and it included building the chronology
10 with respect to all of the off-label activity. A lot
11 of that was from publicly available sources, but it
12 was not pulled together. What we had to do was
13 evaluate whether or not there was a basis for a
14 futility claim; or, in the case of Mr. Abraham and his
15 colleagues, their initial demand letter was focused on
16 the recall, but then later was focused on, they said,
17 the supplemental demand with respect to the off-label
18 issues.

19 So it took a tremendous amount of effort to
20 bring together all of the different products, and we
21 worked closely with Dr. Glass because in each instance
22 we needed to understand: Was there wrongdoing? Was
23 there underlying wrongdoing? Was there something
24 about the way J&J proceeded with the particular
25 product that was problematic? And was there something

1 about the way the governance and the compliance was
2 working that was problematic?

3 We have been through this in other matters.
4 We've cited them. So, yes, we undertook that.

5 And then, your Honor, you didn't ask this
6 specifically, but for the amended complaint, we also
7 hired investigators, and that work was overseen by the
8 Robbins, Geller firm. So a tremendous effort was made
9 to talk to former employees and to round out our
10 understanding of the kinds of failings that were going
11 on that led to these problems and permitted them to
12 persist.

13 That's what we undertook, your Honor.

14 THE COURT: Okay.

15 As I understand your papers, you are not
16 placing any monetary value -- or, rather, you have not
17 quantified the economic value of the injunctive
18 relief.

19 Is that correct?

20 MS. MORRIS: Yes, your Honor, it is, but not
21 quite. We think that under Merola -- and we feel it's
22 well supported, and it goes to the very issue your
23 Honor mentioned previously about loss prevention,
24 because what Chairman Pitt and Dr. Glass -- because
25 this is what Mills teaches, and it's picked up in Bell

1 Atlantic in the Third Circuit. When we go into these
2 cases, if we are going to really do some good for the
3 company, the issue is: Can we prevent this kind of
4 problem on this scale in the future? That's our
5 seminal question. And so when you ask about the
6 economic judgment and your ability to exercise that,
7 we did put of record, your Honor, the various costs
8 that J&J has had to now suffer as the result of the
9 off-label, the anti-kickback, the recalls, and we laid
10 that out for your Honor.

11 And even putting aside an anticipated
12 Government 1.7 billion, whatever it may be, there is
13 over a billion dollars of damage that the company has
14 realized, and this is what Chairman Pitt suggests.
15 It's just common sense, and the Courts say this. If
16 you ask, if these reforms reduce the likelihood of
17 this kind of problem on this scale in the future,
18 let's imagine it's a 50 percent reduction in the
19 likelihood, you are talking about a half a billion
20 dollars.

21 Now, we are not claiming that you should
22 ascribe that to it.

23 THE COURT: No, that's not what you have
24 suggested.

25 MS. MORRIS: That's correct. But it is a

1 basis for exercising your economic judgment, as Merola
2 might suggest to do it, and that's why we've provided
3 it.

4 THE COURT: Well, I think it's more in the
5 future, too, if you want to say to me that there has
6 been some substantial benefit. I know that you
7 provided to me the transcript of a hearing before
8 Judge Rakoff, where the Litowitz firm was involved,
9 where the same kinds of arguments are being made,
10 which is what you are really doing is preventing
11 future harm as well, and that has a real value. It
12 has a value, but I think that no one has attempted
13 certainly to come up with an economic value or to
14 quantify the economic value. It would require an
15 expert to somehow come in and say what that economic
16 value is.

17 So I don't have it. I appreciate there is a
18 value, but there is nothing obviously in the record to
19 say exactly what that value would be.

20 MS. MORRIS: That's correct, your Honor. But
21 I'm not sure this is an issue for experts different
22 than the ones we brought to you. And if I can have a
23 moment to explain what I mean by that.

24 THE COURT: But I don't think they have opined
25 really on that either.

1 MS. MORRIS: They haven't opined on a dollar
2 number.

3 THE COURT: That's all I'm asking about.

4 MS. MORRIS: That's right.

5 THE COURT: I think we are on the same page.
6 I said that there is a value, but they have not opined
7 on what that is.

8 MS. MORRIS: I don't think that's quite right.

9 THE COURT: Show me where.

10 MS. MORRIS: In the Pitt --

11 THE COURT: Remind me which binder I'm going
12 to find the Pitt one in. I assume you are talking
13 about Pitt, not Glass.

14 Correct?

15 MS. MORRIS: Yes, your Honor.

16 THE COURT: Identify a paragraph number that
17 you want me to look at.

18 Does somebody has a loose copy of it so I
19 don't have to go through the binders to look for it?
20 I've tabbed them, but there are just too many.

21 (Pause.)

22 MS. MORRIS: Your Honor, he does not ascribe a
23 dollar number.

24 I'm going to hand this up to you. It's right
25 in his conclusion, your Honor, and it goes to the loss

1 prevention. It's not a dollar number.

2 THE COURT: That's all I have been asking you.

3 MS. MORRIS: It's not a specific dollar
4 amount. That's correct.

5 THE COURT: So we are on the same page.
6 That's exactly what I said. I do appreciate he opines
7 it has an economic value in some way because it's
8 preventing future harm, but that no one has quantified
9 anywhere where that is.

10 MS. MORRIS: That's correct.

11 THE COURT: Thank you. We're finished on that
12 point.

13 MS. MORRIS: Yes.

14 THE COURT: Now, part of that, by the way, is
15 going to some of the questions I'm going to ask you in
16 a little bit as well when we talk about attorney's
17 fees and the manner in which you evaluate what these
18 are.

19 MS. MORRIS: Yes, your Honor.

20 THE COURT: Now, with regard to the
21 objections -- and I'm focusing now, by the way, solely
22 on the settlement itself, not the fees. I'm going to
23 deal with the fees issue separately in a moment.

24 I think I've already asked Mr. Frank a number
25 of questions actually that already dealt with the

1 objections and also the experts.

2 Is there anything else, Mr. Frank, that you
3 wanted to bring out with regard to your objections?
4 We are not on the fees, just on the settlement
5 overall.

6 MR. FRANK: No, your Honor.

7 THE COURT: Okay.

8 Is there anything else that counsel want to
9 bring up, respond to, with regard to any of the
10 objections that have been raised to the settlement
11 itself?

12 MS. MORRIS: No, your Honor. None.

13 THE COURT: Okay.

14 Let me turn to the issue at this time of the
15 attorney's fees.

16 Now, one of the things that I want to focus on
17 at the outset is, I think that I, myself, used the
18 terms in speaking with counsel a couple of weeks ago
19 in requesting supplemental information, that I may
20 have used the terms "lodestar" and "lodestar
21 cross-check" interchangeably, and that was not
22 accurate.

23 Now, in this case, because there is no common
24 fund and because plaintiffs have not attempted in any
25 way to quantify an economic value to the injunctive

1 relief, the manner, and really the only manner left to
2 us to calculate attorney's fees, is to begin with a
3 lodestar calculation.

4 Would you agree with that?

5 MS. MORRIS: Your Honor, there are a number of
6 factors that the Third Circuit considers. Lodestar is
7 certainly an important piece of that, yes, but there
8 are other factors.

9 The mere absence of a quantified economic
10 benefit alone we don't put aside; that there is
11 substantial benefit here, we believe. We can speak to
12 that. In that context of course your Honor has to
13 look at the lodestar, and that's why we offer it to
14 your Honor.

15 THE COURT: There is no other way to calculate
16 it; is there? When you have a common fund case, we
17 look at percentages and what the values are, and then
18 you do the lodestar cross-check to say: Does it make
19 sense or not? And then you go from there on the
20 percentage.

21 Now, there are two arguments obviously you've
22 got. You start with your lodestar and then you would
23 like to apply a multiplier. But you have to start
24 with the lodestar.

25 MS. MORRIS: Absolutely, your Honor.

1 THE COURT: That's what I'm talking about.
2 I'm not at a multiplier yet.

3 MS. MORRIS: Yes, we start with the lodestar.

4 I just want to be clear with the Court that in
5 addition to the lodestar, you will get other
6 contextual issues, the comparables, and I know your
7 Honor is aware of that, and I'm sure we will come to
8 those factors.

9 THE COURT: That's when you are talking about
10 what a reasonable fee is. The lodestar is not that
11 yet.

12 Looking at comparables as well is really
13 looking at when you start to apply multipliers and
14 things of that nature; because when you look at
15 lodestar, the two inquiries are the hourly rate --

16 MS. MORRIS: Correct.

17 THE COURT: -- and the reasonableness of the
18 hours expended.

19 Correct?

20 MS. MORRIS: Correct.

21 THE COURT: So we start with that.

22 MS. MORRIS: Very good.

23 THE COURT: And we don't compare you to
24 somebody else on what reasonable hours are and things
25 like that. We look at this case.

1 MS. MORRIS: Fair enough.

2 THE COURT: So the question that I have here
3 is, certainly when you do a lodestar cross-check,
4 because you are not using the lodestar, you are using
5 a different method and you use that to compare, we
6 don't do full flown traditional lodestar analysis. We
7 don't require all the underlying documentation,
8 et cetera.

9 In this case or type of case, where I must
10 undertake a lodestar analysis, because that is the
11 relief being requested with then the multiplier on
12 top, isn't that the traditional lodestar analysis as
13 we understand it which requires the Court to review
14 the reasonable hourly rate? And you've provided me
15 with additional information on that.

16 MS. MORRIS: Yes.

17 THE COURT: And, as well, to review whether
18 the hours expended were reasonable, duplicative,
19 excessive, the normal analysis.

20 Correct?

21 MS. MORRIS: Of course, your Honor.

22 THE COURT: Okay.

23 So with that, does that not require that I
24 have more information than I have?

25 MS. MORRIS: Well, your Honor, let me tell you

1 what other Courts have done, and you can consider
2 whether or not you think this record is adequate, and
3 I think the record is adequate.

4 No. 1, we did provide a joint attorney
5 declaration to give your Honor a detailed narrative of
6 the progress of the litigation, how it progressed.
7 That was one thing we did.

8 THE COURT: It's a summary. This is really my
9 question to you, Ms. Morris. I'm going to get right
10 to it.

11 MS. MORRIS: Yes.

12 THE COURT: They were all summaries with
13 category breakdowns. I understand some Courts --
14 basically, when I looked at some of these opinions,
15 they are one sentence: "We find it reasonable. We
16 are going to approve it" -- once they've determined
17 it's a reasonable hourly rate.

18 But within the categories themselves, how can
19 the Court determine whether the hours spent on
20 particular things -- and the categories are very
21 broad, and obviously I asked for some additional
22 information on the category on motions. I said:
23 Would you please explain what motions you worked on
24 and how many hours were spent? And each firm did
25 that, but, again, in a general fashion, and each firm

1 broke that down for me.

2 The other problem is each firm didn't do it in
3 a standardized way. What I ended up getting in the
4 way of the affidavits is that they used perhaps
5 different titles to refer to a motion. Some attorneys
6 included the actual court appearances or telephone
7 conferences or things of that nature. I'm not sure
8 what everyone did. Some of them took them out
9 separately and did it in the way of hours. But I've
10 got just an overall number.

11 For instance, for lead plaintiff, a
12 consolidation motion: "All plaintiffs." That
13 includes demand futility and demand refused
14 plaintiffs -- no, it's not "demand refused." Excuse
15 me. "Demand refused" are on the motions to intervene
16 that were filed.

17 So just demand futility plaintiffs, and I had
18 gotten essentially two competing applications, and
19 then you consented to it. But I had a total of 384
20 hours between all the firms on those two motions.

21 MS. MORRIS: Your Honor, can I address that
22 process for you so that you can appreciate some of
23 what was happening to that was not directly in front
24 of you?

25 THE COURT: Let me just also say, and then for

1 the demand refused on their motions to intervene and
2 appoint lead counsel, I had a total of 638 hours and
3 then another 100 hours for the conferences about this.
4 So over 700 hours about appointing counsel.

5 MS. MORRIS: Your Honor, I can speak to the
6 demand futility side of this, and Mr. Abraham perhaps
7 can speak to his, because I'm not as deeply familiar
8 at this level, and I want to give your Honor the
9 detail you need.

10 We, Morris & Morris, filed our futility
11 case -- and this will take a moment to explain -- on
12 behalf of Ms. Calamore. Then two other firms came
13 into the case; and being very mindful of this
14 District's caution to try to work together and not
15 burden the Court with motion practice over lead
16 counsel, we reached out to those counsel; and while we
17 were discussing with them forming a group, we drafted
18 a motion, and that's reflected in our time. That's
19 part of what built our time. Then Mr. Lebovitch's
20 firm came in and they filed.

21 So I talked to the two firms who were
22 originally in the case with us -- they filed their own
23 cases, but who were going to form a group with us. I
24 said: Let's talk about instead, if you want to take a
25 back seat, let's have Mr. Lebovitch come in -- a well

1 known firm, they are highly regarded -- it would be
2 beneficial. He also brought with him Carella Byrne.

3 In the meantime, while we are negotiating with
4 them -- and, your Honor, I just want you to appreciate
5 what goes on -- while we were discussing with them
6 creating a different leadership structure, we drafted
7 a motion. That one didn't need to get filed because
8 then along came the Robbins Geller firm.

9 So each of those steps required some work. So
10 you will see in the Morris & Morris declaration, my
11 declaration, what those steps were. Even though they
12 didn't get filed, we had to draft them.

13 THE COURT: Let me just stop you one second,
14 Ms. Morris. I can't get into the specifics because I
15 don't have the breakdown even from you.

16 What amount of time was spent negotiating with
17 other attorneys? What amount of time was actually
18 spent drafting briefs? Because, frankly, let's put it
19 right out there: These lead-counsel-type briefs and
20 the affidavits, the law is not novel; you all cite the
21 same law as to what the criteria are, and you tell me
22 how wonderful you each are, and why you should be the
23 one that's picked, and then you provide your resumes
24 and attach them, and you highlight what's in the
25 resumes as to who the attorneys will be. I don't

1 think you are recreating the wheel every time you file
2 these.

3 MS. MORRIS: This was a little different,
4 actually, your Honor. This was a little different
5 because this is a situation where we had pled a very
6 different type of complaint than anybody else, and
7 that was one of the reasons we became lead in the
8 case. We pled a different type of complaint.

9 I just want you to understand, your Honor,
10 people worked very hard to do this as efficiently as
11 they could, and I think you will find, and I could
12 explain for you.

13 THE COURT: Well, I think today is not the
14 day, I can take every one of these fine points. I'll
15 talk about that in a while.

16 But I'll point out as well, for instance, then
17 I got the over 600 hours from the various demand
18 refused plaintiffs.

19 And I'm just going to deal with these in
20 general categories.

21 For instance, between all the plaintiffs with
22 regard to the original complaint and demand letters,
23 1,456 hours; drafting the amended complaint, demand
24 refused complaint, 1,849 hours. I know you also said
25 you hired investigators. That's an expense, your

1 investigators.

2 MS. MORRIS: That's correct.

3 THE COURT: So their time is not included.

4 MS. MORRIS: That's correct, your Honor.

5 THE COURT: So we are talking about, between
6 the two complaints, over 3,000 hours.

7 Put that aside.

8 What I'm saying is, and I guess what I really
9 want to come down to is, one of the problems that I
10 have with regard to doing a lodestar calculation is,
11 while you are all very, very experienced, and
12 respected counsel in these areas -- indeed, that's why
13 you presented your various cases and affidavits, to
14 show why you thought you were the right people to
15 handle this, that you could avoid duplication, that
16 you were expert in the field -- and when I see the
17 hours that have been expended in the case, which are
18 staggering, understanding that we never got to
19 discovery, and, indeed, never got to a complaint that
20 was accepted by the Court, it gives this Court
21 obviously pause without further elucidation.

22 I don't know if there was duplication. Maybe
23 everything you did was merited. But part of the
24 things that you said to me in your applications for
25 why a structure was appropriate was to avoid that. I

1 know that in a general fashion the affidavit says that
2 has been provided to me on fees says: And we worked
3 with our structure to assign tasks and avoid, but I
4 don't know any specifics of that to make an
5 independent determination whether that indeed
6 occurred. Because, frankly, just looking at the
7 number overall, it is staggering as to what is being
8 provided from all these different firms on many of the
9 same tasks.

10 For instance, on the motion to dismiss the
11 demand futility case, I have from plaintiffs 837
12 hours. I don't know what each of you were doing on
13 that to respond or how it was divided or if there was
14 duplication or why it took that many hours. We didn't
15 really have a lot of novel issues in that motion
16 either, and you are expert in the field. So I have
17 these kinds of questions, and it well may be that
18 every hour spent by every attorney on this case was
19 merited. I cannot make that determination today.

20 MS. MORRIS: How can we be helpful to you,
21 your Honor?

22 THE COURT: I think that ultimately we are
23 going to need a lot more information, and, frankly,
24 the Court's resources can't be expended that way. I'm
25 going to appoint a Special Master to consider the

1 issue of the attorney's fees, and you can provide
2 whatever materials that individual will feel are
3 necessary to review, the hours expended, the work
4 done, and how it was done, and it could be also done
5 by formal submissions, and also that person can
6 actually communicate with each one of you to get
7 further explanation, if necessary, because they will
8 have the time to do it, and it will be a better use of
9 this Court's resources, and then make that
10 recommendation to me.

11 I think that is the best way to proceed. I
12 tried to start to break it down by asking for
13 supplemental information but realized that wasn't
14 where I needed to be and what I would really require.

15 What we do require when we do a traditional
16 lodestar analysis is obviously substantially more than
17 summaries, particularly with the amount at stake here,
18 and I want to make sure you are fairly compensated. I
19 don't want to give short shrift to it and have you
20 think that I think the numbers sound high because it
21 may be merited.

22 MS. MORRIS: I understand, your Honor, of
23 course.

24 THE COURT: So that's what I think is the best
25 way to proceed, and we will not have to take further

1 argument on the lodestar today.

2 MS. MORRIS: Very good. Thank you, your
3 Honor.

4 Did you have any other questions for me at
5 this time?

6 THE COURT: No.

7 I'll hear briefly from Mr. Frank because I
8 know, Mr. Frank -- I don't know that you have anything
9 really more to say. I know it all goes to you
10 thinking that a substantial benefit was not realized
11 for the class and the fees are excessive.

12 MR. FRANK: That's correct, your Honor. We
13 can rest on our papers.

14 THE COURT: Fine. Thank you very much. I
15 appreciate that.

16 Let me then briefly say the following:

17 One, I am going to deny the motion to
18 intervene. I think it was fair from the discussion I
19 also had -- and I'll give my reasons in an opinion --
20 with Mr. Frank that, really, I will consider his
21 objections and have considered them, and he has
22 preserved his right to appeal and that is appropriate.

23 Two, I will go through all the factors in the
24 opinion, but I will approve the settlement. I find it
25 will satisfy all the factors here, and that there was

1 a substantial benefit in this matter that was
2 rendered.

3 It will all be included in an opinion with my
4 reasons. Some of you have sat here before while I've
5 read lengthy opinions into the record, and, frankly,
6 I'm still working on it, but I'm not going to read
7 something into the record today and waste your time.
8 I'll issue a formal opinion that everyone can review.

9 With regard to the attorneys fees, that will
10 be left open until it can be reviewed and a
11 recommendation made.

12 I will not be asking the Special Master to
13 make a recommendation on a multiplier. Once the
14 lodestar is established, I will come back and
15 determine what multiplier, if any, is appropriate in
16 this case, and I will rule on it at that point.

17 Yes, Mr. Frank.

18 MR. FRANK: One thing, your Honor.

19 We accept that you have denied our motion to
20 intervene. But just as a procedural matter, if you
21 could withhold issuing that order until you've issued
22 the order on attorney's fees, that would be very
23 procedurally helpful because issuing the denial of the
24 motion to intervene starts the 30 days for us to
25 appeal that to the Third Circuit, and we might not

1 appeal anything.

2 THE COURT: It will be interlocutory until I
3 issue a final order on the fees.

4 Mr. Carlson, you wanted to say something?

5 MR. CARLSON: Your Honor, it was our hope that
6 you would approve the settlement promptly. I don't
7 know whether what Mr. Frank is asking for would defer
8 approval of the settlement. I frankly think we have a
9 form of judgment order. It probably needs to be
10 modified.

11 THE COURT: I'm not entering any judgment
12 until I issue my opinion.

13 MR. CARLSON: I understand that. And the
14 judgment order will need to be updated for the
15 supplemental notice that your Honor authorized us to
16 do, which we did do. But once you have your opinion
17 and once we have that supplemental order, I would like
18 the judgment order dismissing these cases entered
19 without waiting for the attorney's fee issues to be
20 decided because that was the agreement we had, and
21 without waiting for the attorney's fee issue with
22 Mr. Frank and the intervention to be delayed.

23 THE COURT: Mr. Cecchi, you wanted to say
24 something?

25 MR. CECCHI: My only comment, your Honor,

1 observation would be that we are happy to proceed as
2 fast as necessary to get the issue back before your
3 Honor and to start working with the Special Master as
4 soon as practical.

5 THE COURT: Mr. Frank, I can't speak to the
6 question of when your clock will begin to run because
7 while there will be -- look, the way the Third Circuit
8 normally looks at it, but I'm not going to tell you
9 what the Third Circuit would do is, while I may be
10 issuing a judgment and order approving the settlement,
11 normally if there is still an issue of fees -- and
12 this happens always in the employment cases,
13 whatever -- there is an issue of fees outstanding, and
14 we reflect that that's to be decided, it will not be
15 final for appeal purposes, is my belief.

16 MR. FRANK: The Supreme Court holds that a
17 denial of a motion to intervene is a final judgment
18 that starts the 30 days running with respect to that
19 motion.

20 THE COURT: Okay.

21 If that's the only thing you want me to hold
22 off on, does anybody have a problem if I hold off just
23 on that aspect?

24 MR. CECCHI: No, your Honor.

25 MS. MORRIS: No, your Honor.

1 THE COURT: Mr. Carlson? I don't know if it
2 makes sense. That's my problem with it.

3 MR. CARLSON: I actually don't know if you can
4 approve a final judgment dismissing the case when
5 there is a pending motion to intervene.

6 THE COURT: I don't think I can either.

7 MR. CARLSON: I hear it. I would like to make
8 Mr. Franks' life easier, but I don't think in the
9 circumstances here his desire to avoid -- it may be he
10 needs to take two appeals.

11 THE COURT: He may have to, or you can present
12 to the Third Circuit whether they stay their
13 consideration until the fees are decided. I think I
14 do have to rule on it. But I appreciate what your
15 argument is, Mr. Frank. You will have to do what you
16 think is appropriate.

17 MR. FRANK: Thank you, your Honor.

18 THE COURT: Thank you.

19 Anything else, counsel?

20 MS. MORRIS: No, your Honor.

21 THE COURT: I guess it will really only apply
22 to the plaintiffs with regard to the Special Master
23 because you are not taking any position.

24 Correct?

25 MR. CARLSON: Right. Our settlement agreement

1 is very clear on this. We are prepared to pay what we
2 agreed to pay. We are not taking any position with
3 respect to their fees, and it's for your Honor to
4 decide what's a fair fee.

5 THE COURT: Okay.

6 We can go off the record.

7 (Brief discussion off the record.)

8 THE CLERK: All rise.

9 (Proceedings concluded.)

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C E R T I F I C A T E .

I, **Vincent Russoniello**, Official United States Court Reporter and Certified Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee, nor attorney, nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.

S/Vincent Russoniello
Vincent Russoniello, CCR
Certificate No. 675
Date: December 26, 2012

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